

# **SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES**

## **Chapter 13**

### **Information on the Rights of Students with Serious Health Conditions to Appropriate Educational Services**

From a 13-Chapter Manual

Available by Chapter and in Manual Form

Written by:

**Community Alliance for Special Education (CASE)**

and

**Protection and Advocacy, Inc. (PAI)**

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**Ninth Edition**

**November 2005**

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Federal special education law was significantly amended by Congress in 2004 and will be further clarified by regulations from the U.S. Department of Education in 2006. The California Education Code has been amended to reflect some of the federal law changes but not all. In certain circumstances where it provides greater protections or entitlements, California law will continue to control special education pupils' rights unless it is amended to completely conform to federal law.

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**COMMUNITY ALLIANCE FOR SPECIAL EDUCATION (CASE)** provides legal support, representation, technical assistance consultations, and training to parents throughout the greater San Francisco Bay Area whose children need appropriate special education services. Trained advocates and attorneys assist parents at IEP meetings, Mediation Conferences and Due Process Hearings. CASE also provides free consultations about special education rights and services to parents and professionals by telephone or face-to-face. CASE is a nonprofit organization serving all children with disabilities who need or may need special education services. For more information, contact:

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**PROTECTION AND ADVOCACY, INC. (PAI)**, is a private, nonprofit organization that protects the legal, civil and service rights of Californians who have developmental or mental disabilities. PAI provides a variety of advocacy services, including information and referral, technical assistance, and direct representation. For information or assistance with an immediate problem, call:

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PAI receives funding under the Developmentally Disabled Assistance and Bill of Rights Act and the Protection and Advocacy for Mentally Ill Individuals Act. Any opinions, findings, recommendations or conclusions expressed in this publication are those of the authors and do not necessarily reflect the views of the organizations which fund PAI.

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**NOTE:** The text in each chapter refers to specific questions in other chapters by using the titles shown above

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### **Information on the Rights of Students with Serious Health Conditions to Appropriate Educational Services**

- 1. My child has a serious illness that will keep him from school attendance for periods of time during and after treatment. Must he be found eligible for special education or Section 504 in order to receive any special consideration from the school system that would help him stay current with his education?**

No. The California Education Code makes provision for students with temporary disabilities which affect their school attendance and which may require individualized instruction to receive that instruction. [See Cal. Educ. Code sections 48206.3 – 48208.]

- 2. Who is responsible for providing individualized instruction to my seriously ill child while she is at home, and what school district is responsible for these services if my child is temporarily hospitalized at a hospital in another school district?**

While your child is at home with her parents, she is deemed to reside with her parents and her parents' school district of residence is responsible for providing individual instruction. [Cal. Educ. Code Sec. 48206.3(a).] If your child is hospitalized in a hospital within your school district of residence, your school district of residence will be responsible for individual instruction. If your child is hospitalized in a hospital outside your school district of residence, the child is deemed to reside, for school attendance purposes, in the school district in which the hospital is located. [Cal. Educ. Code Sec. 48207.]

- 3. How do I as a parent ensure that my child, who is not a special education or Section 504 student, but who is hospitalized in another school district, receives needed educational services during her hospitalization?**

A parent must notify the school district in which the hospital is located of the child's presence in that hospital and of his need for educational services. [Cal. Educ. Code Sec. 48208.] Once the school district receives that notification, it

must, within five working days, determine if the student is capable of receiving individualized instruction and when. If the pupil can receive individualized instruction, that instruction must begin within five working days of the school determining that the child can receive it. [Cal. Educ. Code Sec. 48208(b)(1).] The school district in which the hospital is located has the option of contracting with the child's previous school district of residence to provide the individualized instruction. [Cal. Educ. Code Sec. 48208(b)(2).] Within five working days of the student beginning individualized instruction, the school district in which the hospital is located must notify the student's previous school district of residence that the previous district can no longer count the student as being in attendance in the previous school district for state revenue purposes. [Cal. Educ. Code Sec. 48208(b)(3).]

In an age of managed care and shorter hospital stays than, perhaps, took place when these laws were written, if your child is going back and forth between a hospital in another school district and your home in your school district, the five-day time periods described above could result in no educational services ever starting up in either setting because the child is never in either setting long enough. To whatever extent a parent knows where a child will be and how long he will be there, the parent should assume that such a proposed schedule will hold and should contact the responsible school district or districts in advance to start the process of arranging for individualized instruction.

#### **4. If my child is not identified under Special Education or Section 504, how much individualized instruction will my child receive?**

The law states that each clock hour of teaching time devoted to individual instruction counts as one day of attendance for purposes of the responsible school district generating daily attendance revenue from the state. [Cal. Educ. Code Sec. 48206.2(c)(1).] The law also says that no pupil can be credited with more than five days of attendance per week. [Cal. Educ. Code Sec. 48206(c)(2).] Because a school district only has to provide one hour of individual instruction in order to generate a full day of attendance revenue from the state, and because a school district cannot generate any more than five days of revenue per week, even if it provides more than five hours of individual instruction in that week, school districts have an incentive to provide at least five hours of individual instruction per week, but no incentive to provide any more. There is, unfortunately, no law requiring school districts to provide enough individual instruction to each seriously ill child, regardless of whether the district generates any additional revenue by doing so, to enable each student to stay current with all his courses and to maintain his grades.

If, however, your child is eligible for special education or is a Section 504 student, his educational program must be individualized to meet his needs. It cannot be automatically assumed, therefore, that five hours of instruction will meet his unique needs or be sufficient to include all the instructional and related services necessary for an appropriate education.

**5. If my child's illness is not going to be temporary but may affect his educational progress for a significant period of time or permanently, is there any advantage to seeking to have my child identified under Section 504 or under Special Education?**

Yes.

*Section 504 Generally.*

Section 504 is a federal anti-discrimination law that prohibits agencies that receive any federal financial assistance, such as public schools, from discriminating against people because they have a disability. [29 U.S.C. Sec. 794.] A person with a disability under Section 504 is any person whose impairment substantially limits a major life activity, such as learning, or someone who has a record of such an impairment, or someone who is regarded as having such an impairment. [34 C.F.R. Sec. 104.3(j).] Discrimination, under Section 504, includes the failure of a school district to educate a person with a disability appropriately regardless of the nature or severity of his disability. [34 C.F.R. Sec. 104.33(a).] An appropriate education under Section 504 means providing regular or special education and related aids and services that are designed to meet the individual educational needs of the person with a disability as adequately as the needs of persons without disabilities are met. [34 C.F.R. Sec. 104.33(b)(1).] Therefore, if a child's health condition substantially limits his learning, he may qualify as a disabled person under Section 504.

*Application of Section 504.*

If, for example, a school district's offer of five hours of individualized instruction per week is not designed to meet his individual educational needs as adequately as a student without a disability who can attend school all day, Section 504 may be violated and the student may be in a better position to insist on a more comprehensive individual home or hospital instruction program. Whether five hours of individual instruction fails to meet the individual educational needs of a student with a disability as adequately as the needs of other students are met must be determined by evaluation and not based on considerations of the maximum and minimum possibilities for revenue generation. In addition to being "appropriate," as described above, a non-discriminatory educational program under Section 504 must have been based on complying with Section 504's evaluation and placement

procedures. [34 C.F.R. Sec. 104.33(b)(1).] Before arriving at, for example, a determination of how many hours of individual instruction a seriously ill child will receive at home or in the hospital, a school district shall conduct an evaluation of the student. [34 C.F.R. Sec. 104.35(a).] The evaluation must include tests and other evaluation materials which are tailored to assess the specific areas of educational need of the student. [34 C.F.R. Sec. 104.35(b).] If, after evaluating the individual needs of a student, the school district determines, for example, that five hours of home or hospital instruction is sufficient to meet his needs as adequately as the needs of nondisabled students are met, and if the parents disagree, the school district must provide an impartial hearing process in which the parents can challenge the school district's decisions. [34 C.F.R. Sec. 104.36.] In addition, to a hearing process, a parent can also file a complaint under Section 504 with the Office for Civil Rights in San Francisco. That office has previously investigated the issue of a school district putting arbitrary limits on the number of minutes of home instruction it is willing to provide and has found such limits to be discriminatory. [*Conejo Valley (CA) Unified School District* (2000) 20 IDELR 1276.]

#### *Special Education Generally.*

Special education is a federally-based and partially federally funded entitlement program which is designed to ensure a free appropriate public education to students with certain qualifying disabilities. There are approximately 13 categories of disability which are served under special education. One of those categories is known as "other health impaired" and is likely the category which would most often apply to students with serious health conditions. An "appropriate" education under special education is somewhat different than an "appropriate" education under Section 504. Under special education, an eligible student is entitled to a program which is individually designed to meet his unique needs in relationship to his individualized goals and in relation to the general curriculum of the school district, among other things. Appropriate special education services are those which enable a student to make progress toward his annual goals and to access and make progress in the general curriculum of the district. [20 U.S.C. Sec. 1414(d)(1)(A)(IV).] Decisions about what services a special education student needs in order to make this progress must also be based on evaluations of the student. [20 U.S.C. Sec. 1414(b)(2)(A)(ii).] All students who qualify for special education under one of the 13 categories are considered to have disabilities which are substantial enough to qualify them as persons with disabilities under Section 504 also. The reverse is not necessarily true. Not all students with learning impairments that would qualify them under Section 504 also qualify under one of the 13 categories for special education.

#### *Application of Special Education.*

If, after evaluating a seriously ill special education student, a school district decided, for example, that five hours per week of individual instruction was sufficient to enable the student to continue making progress toward his annual goals and to continue accessing and making progress in the general curriculum, and if the parents disagreed with the school's recommendation, the parents could appeal to an impartial hearing process. [20 U.S.C. Sec. 1415.]

In addition to the law regarding each special education student's entitlement to sufficient services to allow for progress toward annual goals and progress in the general curriculum, for special education students with health issues, temporary or chronic, California has developed additional regulations. [5 Cal. Code Regs. Sec. 3051.4 and 3051.17.]

For all special education students, not just those identified as "other health impaired," who have medical conditions relating to surgery, accidents, short-term illnesses, or treatment for chronic illnesses, the individualized education plan (IEP) team must review and revise each student's IEP whenever there is a significant change in the student's medical condition. If the team recommends home instruction, it must be based on a doctor report which verifies the medical condition and the fact that the student cannot attend school and that indicates approximately when the student will be able to return to school. The instruction must be provided by a regular class teacher, special class teacher, or resource class teacher if the person is competent and it is feasible to do so. Whoever is providing the home instruction must check with the student's previous school and teacher to determine the course work to be covered, the books and materials to be used, and who will issue grades and promote the student when the time comes. For middle and high school students, the home instructor must check with the school guidance counselor to determine the hours the student has earned toward semester course credit in each subject included in the student's IEP and the grade on the last day of attendance, who will issue credits for course work completed, and who will issue a diploma if the student is graduating. [See 5 Cal. Code Regs. Sec. 3051.4.]

For special education students who are eligible under the "other health impaired" eligibility category, specialized services may be provided. These include individual consultation, home or hospital instruction, and other instructional methods using advanced communication technology. For pupils in remission or passive states of their health condition, the IEP team must specify the frequency for monitoring the pupil's progress to ensure that the illness does not interfere with the student's educational progress. If there is an acute health problem which causes five or more consecutive days of absence, the teacher must notify the principal and the principal must convene the IEP team to determine what to do. If there is a pattern of sporadic illness, the IEP must meet to consider other means for the pupil to demonstrate competencies in required courses so that the cumulative

number of days of absence does not prevent educational progress. [See 5 Cal. Code Regs. Sec. 3051.17.]

**6. Who qualifies for special education under the “other health impaired” category?**

Students qualifying for special education under this category are those who have limited strength, vitality, or alertness [including a heightened alertness to environmental stimuli that results in limited alertness in the educational environment], that is due to chronic or acute health problems, including, but not limited to, a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, hematological disorders, such as sickle cell anemia and hemophilia, nephritis, attention deficit disorder, or attention deficit hyperactivity disorder, and which adversely affects a student’s educational performance. [5 Cal. Code Regs. Sec. 3030(f); 34 C.F.R. Sec. 300.7(c)(9).] An adverse effect on educational performance is measured primarily by a student’s grades, but may also include consideration of conduct and attendance.

**7. What if the school officials acknowledge my child’s health condition, but say that my child does not really need special education instruction or that he has above-average academic abilities and, therefore, cannot be eligible for special education?**

In addition to meeting the definition of a special education disability category, a student must also “need” special education in order to qualify for special education. [Cal. Educ. Code Sec. 56026(b); 34 C.F.R. Sec. 300.7(b)(2).] Arguably, however, even if a student would not otherwise be receiving specialized instruction if he was in school without a health condition, if, because of his health impairment, he will otherwise regress educationally and perhaps even fail because he needs the extended and/or intermittent home or hospital-based instructional services offered by special education, then such a student likely “needs” special education for eligibility purposes.

Above-average intelligence or academic ability, by itself, does not mean a student cannot be eligible for special education. [*Letter to Ulissi* (OSEP, 1992) 18 IDELR 683; *Corchado ex rel. Corchado v. Board of Education* (W.D.N.Y. 2000) 86 F.Supp.2d 168.] These characteristics may, however, be sufficient to prevent the required “adverse effect on educational performance” (poor grades) required by, for example, the “other health impaired” category for special education eligibility purposes.

**8. If my child requires modification of his school program once he returns to school after a long absence, must I have a formal Section 504 plan or IEP developed? What if the school administrator prefers not to develop any formal plan but promises that my child will get what he needs?**

If a teacher or principal suspects, for example, that, because of a health condition, a child may be a child with a disability under Section 504 or may qualify for special education, the law requires school districts to have systems in place which enable school staff to refer students for special education assessment to determine if they are eligible and to offer them a free appropriate public education under either Section 504 or special education law if they qualify. Similarly, a parent can initiate this referral to the school district's special education department. State regulations require that all referrals of students for special education assessment by parents must initiate the assessment process. [5 Cal. Code of Regs. Sec. 3021(a).] Under Section 504, however, the school district must suspect that the child has a qualifying disability before it will be obligated to undertake assessment.

If a child is assessed and found eligible and offered an IEP or Section 504 plan, the parent can then choose whether or not to enter into such a plan with the district or instead trust in the promises made by a school official to provide everything a student needs without a formal plan. But school officials should not be attempting to circumvent their evaluation responsibilities by making service promises instead. And they should not be making service and placement-related promises based on no assessments as to how the child's health condition affects learning and what all, specifically, the child needs in the way of services, modifications, and accommodations.

There are at least three potential problems with trusting in promises made in lieu of formal written plans. First, if the intent to meet the student's needs is genuine, there should be no hesitation in putting these intentions in writing. Second, without a written plan, school staff may not be clear as to what the student's needs are, what interventions are necessary to meet those needs, who is responsible for implementing the interventions, and what the rules are regarding academic expectations and grading. Third, if the school fails to follow through on the promises made, the parent is without an enforcement remedy, either through the Office for Civil Rights for a Section 504 plan or through the State Department of Education for an IEP, because the parent has never formalized the fact that the child is officially a Section 504 or special education student. Moreover, there are no specific terms of any plan in place for the OCR or State Department of Education to investigate and enforce.

**9. How do I refer my child for special education or Section 504 assessments?**

You should write a letter to the school district special education department or office describing your child's condition and how it is affecting his education and asking that the district evaluate your child under both special education and Section 504 to determine if he is eligible for an IEP or Section 504 plan. Keep a copy of your letter. Date the letter. If the school district agrees to conduct a special education evaluation, it must provide you with an assessment plan within 15 days. [Cal. Educ. Code Sec. 56321(a).] Once the school district receives your consent to the assessment plan, it has 60 days to complete the assessments and hold an initial IEP meeting with you. [Cal. Education Code Sec. 56344.] There are no specific time lines for conducting assessments and holding meetings under Section 504. However, if you ask that your child be considered under both sets of laws, the district may be able to use much of the same assessment information to determine whether your child would qualify under Section 504 as it used to determine his special education eligibility and during the same assessment time period.

**10. If my child becomes a special education student because of her health condition, will her special education status affect her ability to be admitted to a college or university?**

No, under Section 504, colleges and universities cannot discriminate on the basis of disability by denying a qualified individual admission. [34 C.F.R. Sec. 104.42(a).] The Americans With Disabilities Act also prohibits a college or university from denying a person with a disability the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of a public college or university. [42 U.S.C. Sec. 12182(b)(1)(A)(i).] Parents and students must, however, make sure that special education does not result in a student leaving high school without being otherwise qualified to enter a college or university, if that is the student's goal. This may include taking all the necessary units in the various required subject areas to earn a high school diploma and passing whatever proficiency tests, such as the high school exit exam, are required of students for the award of a diploma. Parents should be vigilant about making sure that a child's special education identification does not result in his/her being placed on a track leading to something other than a diploma, such as a certificate of completion or achievement. If there are other courses, such as foreign language requirements or advance placement courses the student will need to meet his post-secondary education goals, parents must make sure their student completes these requirements as well.

Beginning at age 16, a special education student's IEP must include appropriate, measurable post-secondary goals based on age-appropriate transition assessments

related to training, education, employment, etc., and the transition services, including courses of study, needed to assist the pupil in reaching those goals. [Cal. Educ. Code Sec. 56345(a)(8).] If a student's post-secondary educational goal, for example, is admission to a university system which requires a high school diploma and has certain other course-work requirements, the IEP should specify those courses necessary to earning a diploma, and the other courses, as well as the transition services needed to assist the student in reaching that goal.

**11. My child is in honors or advanced-placement classes, but because of absences or learning problems associated with his illness or treatment, the school officials say he should be in regular courses instead and that they have no duty to provide accommodations in his honors or AP classes. Is this true?**

No. Section 504 protects both special education students and solely Section 504 students from discrimination in public programs which receive federal financial assistance. Public programs include public school honors or AP classes. The Office for Civil Rights will investigate claims of disability discrimination in the way, for example, schools administer their GATE (Gifted and Talented Education) programs. [*Monterey (CA) Peninsula Unified School District* (2002) 38 IDELR 220.] Discrimination is prohibited in any aid, benefit, or service provided by the public school. [34 C.F.R. Sec. 104.4(b)(i).] If a public school recommends a student with a disability be denied participation in a benefit or service, the issue is what regular or special education and related aids and services, which are designed to meet the individual needs of the person with the disability, did the district offer in an effort to meet the needs of the person with the disability as adequately as the needs of persons without disabilities are met in that benefit or service? [34 C.F.R. Sec. 104.33(b)(1).] The Office for Civil Rights has repeatedly rejected the "reasonable accommodation" standard in analyzing whether schools have provided a free appropriate public education under Section 504 to elementary and secondary education students with disabilities. [See *Letter to Zirkel* (1993) 20 IDELR 134; *Madera (CA) Unified School District* (1995) 22 IDELR 510; *Bonita (CA) Unified School District* (2003) 39 IDELR 8.] However, some courts have applied the "reasonable accommodation" standard to appropriateness determinations for elementary and secondary education students under Section 504. [*J.D. v. Pawlet School District* (2<sup>nd</sup> Cir. 2000) 224 F.3d 60.] Even if the "reasonable accommodation" standard was applied to discrimination in honors or AP class programs, the question would be what reasonable accommodations has the district offered to ensure non-discrimination in the operation of those programs as they relate to students with disabilities. In any case, the school district cannot refuse any regular or special education or related aids and services or reasonable

accommodations and, instead, simply deny access to these programs based on the manifestations of a student's disability.

While a district cannot refuse services or accommodations to students in honors or AP classes under Section 504, a student is probably not eligible for special education if the "need" for special education is based only on the student's need for extra services and assistance in order to be in honors or AP classes. Students who, despite their disabilities, demonstrate exceptional academic performance, do not demonstrate the need for special education services or the required adverse effect, of their disabilities, on their educational performance. [See *J.D. v. Pawlet School District* (2<sup>nd</sup> Cir. 2000) 224 F.3d 60.]

**12. If my child receives instruction at home, may the school district require that one of my child's parents be present in the home during any periods of home instruction?**

Probably. Although there is no California law requiring a parent to be at home during any periods of home instruction, if a school district instituted a policy of requiring this, such a policy would probably be upheld. The only appellate-level federal court to have examined this issue found that such a policy is not a violation of the IDEA or Section 504. [*Daniel O. v. Missouri State Board of Educ.* (8<sup>th</sup> Cir. 2000) 210 F.3d 378.]

**13. If my child receives home instruction, will I have to purchase any necessary equipment, computer, or other technology?**

No. Any equipment or technology necessary to enabling the student to benefit from his home instruction, or to access and make progress in the general curriculum, or to ensure progress on IEP goals must be provided as part of a child's Free Appropriate Public Education under special education or under Section 504. [20 U.S.C. Sec. 1401(9); 34 C.F.R. Sec. 300.105; 34 C.F.R. Sec. 104.33(c)(1); *Eldon (MO) R-1 School Dist.* EHLR 352:144 (OCR, 1986).]

**14. If my child has a communicable disease, may the district refuse to provide a home instructor or refuse to allow the child to attend the public schools on the basis of a risk to school staff or other children?**

The courts will closely scrutinize any district policy that denies home instruction services or school attendance to a student with a communicable disease on the grounds of risk to staff. The courts will inquire into: 1) how great the risk really is in terms of how the disease is transmitted; 2) the duration of the risk; 3) how great the risk is in terms of the consequences of infection; 4) the likelihood of transmission of the disease; and 5) the reasonable steps that could be taken to reduce any risks. [*Martinez v. School Board of Hillsboro County* (11<sup>th</sup> Cir. 1988)]

861 F.2d 1502.] California regulations, however, provide that: “A pupil while infected with any contagious or infectious disease may not remain in any public school.” [Cal. Code of Regs. Sec. 202.]